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MDL NO.
2:12-MD-2327

November 6, 2013

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P R O C E E D I N G S

THE CLERK: Hi, everyone. This is Laura, Judge Eifert's assistant. And I would appreciate it if plaintiffs' counsel could identify themselves first followed by defense counsel.

MS. BAGGETT: Hi. This is Renee Baggett for the plaintiffs.

THE CLERK: Okay.

MR. AYLSTOCK: Bryan Aylstock for the plaintiffs.

THE CLERK: Okay.

MR. GAGE: William Gage for the defendant.

THE CLERK: Thank you.

MR. GAGE: Oh, and Ben Watson is also here for the defendant.

THE CLERK: All right.

MR. BERNARDO: And Richard Bernardo is also here for the defendant.

THE CLERK: Okay. Thank you. Is that everyone?

MR. GAGE: I believe so.

THE CLERK: Thank you very much. Hold one moment for the Judge, please.

MAGISTRATE JUDGE EIFERT: Good afternoon.

So, Mr. Aylstock, are congratulations in order?

MR. AYLSTOCK: They are. Thank you, Judge. I appreciate it. I didn't, I didn't, frankly didn't expect to

1 be on here, but mom and baby are resting so I couldn't
2 resist.

3 MAGISTRATE JUDGE EIFERT: Well, that's good news.
4 What did you have? A little boy or a little girl?

5 MR. AYLSTOCK: Yeah, a little boy, 8 pounds
6 13 ounces, big guy.

7 MAGISTRATE JUDGE EIFERT: Yeah, a big boy. That's
8 wonderful. We're very happy for you.

9 MR. AYLSTOCK: Thank you, Your Honor. I
10 appreciate it.

11 MAGISTRATE JUDGE EIFERT: Now, tell me what the
12 problem is today.

13 MS. BAGGETT: Well, Your Honor, I'll get started
14 as I didn't expect Mr. Aylstock to be on. But I do expect
15 him to fully get involved in this as he's just as
16 knowledgeable, if not more so, than I am.

17 But we hate to have to bring this to your attention
18 but, as you know, as of our hearing on Friday, one of the
19 things that we were, we were bringing to your attention was
20 the position we were put in with the Klosterhalfen and
21 Klinge depositions.

22 The deposition of Klosterhalfen, Dr. Klosterhalfen is
23 November the 9th and 10th which is this Saturday and Sunday.
24 And Dr. Klinge's deposition is the 14th and 15th which is
25 next Thursday and Friday in Germany. And, you know, because

1 of the production of the, the documents in response to our
2 request for their, their custodial files, we've been put in
3 a very difficult position, if not impossible position, to
4 get prepared for these depositions.

5 We've been requesting documents specific to the
6 custodial files of Drs. Klinge and Klosterhalfen since the
7 beginning, for the most part, and we've been specifically
8 narrowing that down along the way. And, more specifically,
9 we've been asking the defendants to tell us or provide to us
10 documents that are specific to the consulting arrangement or
11 agreement and relationship between Klinge and Klosterhalfen
12 and Ethicon/J&J.

13 To date, they have essentially produced over 107,000
14 documents which is over seven hundred -- almost 800,000
15 pages worth of documents that they claim are responsive
16 and -- but most of these documents that have been produced
17 are where Dr. Klinge and Klosterhalfen have been merely
18 referenced such as studies where they're, they're -- their
19 work has been cited in other studies and communications
20 between internal employees at Ethicon that may reference
21 their name.

22 So, a good majority of these documents really do not
23 even involve the custodial relationship or, excuse me, the
24 consulting relationship between Klinge and Klosterhalfen and
25 Ethicon/J&J.

1 And since we've had our hearing on Friday, you did
2 instruct us and we -- Mr. Aylstock, and he can speak to this
3 himself -- but we did contact Mr. Gage in an effort to
4 resolve the issue. But we were basically told that we could
5 do these searches and come up with that information as
6 easily as the defendants.

7 And there's two reasons why that's flawed. One of the
8 ways is, as we said, that these doctors are very, very
9 popular in this litigation. They've been involved as
10 experts for a number of years. Klosterhalfen himself is
11 considered the god of pelvic mesh, and he's referenced in
12 almost everything that's written.

13 And, so, the search terms will pull a lot of documents
14 that are making it difficult for us to get to the ones that
15 really matter. And the specific search terms, if we do
16 not -- if we use just the e-mail addresses to, to, as was
17 suggested by the defendants, it fails to pull up other
18 documents like consulting agreements and, and PowerPoint
19 presentations potentially, and other things that the work
20 that may have been performed or, or produced by, by these,
21 between these, these, this, as a result of this
22 relationship.

23 And just as an example, since our hearing, over 60,000
24 pages have been produced to us since November the 1st that
25 actually most of these should have been produced to our

1 responses over a year ago because they're general references
2 to where they're just named in some of the documents.

3 And we still have not gotten what we needed and what
4 we've been asking for which is for them to identify exactly
5 which documents can be related only to the consulting
6 agreement between the two.

7 MAGISTRATE JUDGE EIFERT: Mr. Gage.

8 MR. GAGE: Judge, this is William Gage speaking.
9 I, I have Rich Bernardo on the phone us with, Judge. He's a
10 lawyer with the Skadden Arps firm in New York, and he is
11 part of the team that represents Ethicon along with me. And
12 I've asked him to be on the call today because he's kind of
13 an e-discovery person expert. And to the -- there probably
14 will be questions and issues that I think he can help us
15 navigate through better than I can.

16 Your Honor, I got a call on Friday -- or, actually, I
17 first got an e-mail and then I followed it up with a call
18 from David Thomas. He was on a hearing with Your Honor.
19 And the issue was that Bryan was having some problems
20 navigating through the, the recent productions that we had
21 just put through the pipeline on Klinge/Klosterhalfen.

22 And Your Honor may remember I sent you a letter and
23 told you we were producing some documents on
24 Klinge/Klosterhalfen.

25 So, I very quickly got on the phone with Bryan, and

1 then realized that kind of some of the scope of the
2 questions were, were ones that I would need to get Rich
3 involved.

4 So, I called Rich, and Rich and I got Bryan on the
5 line. And, and then we got Crivella. And, Judge, Crivella
6 is the documents vendor for the plaintiffs. We got a guy
7 named Vince from Crivella on the line with us.

8 And the issue that, that I appreciated and the issue
9 that I understood was that we had -- we, Ethicon, had
10 produced a large amount of documents, but the K -- we refer
11 to them now, Judge, as -- Drs. Klinge and Klosterhalfen as
12 the K & K documents. The K & K documents were a portion of
13 the larger production.

14 And Bryan needed help rightfully in, in identifying
15 where in this big mass of documents were the K & K documents
16 because what they wanted to do -- what the plaintiffs wanted
17 to do was elevate, put those in the front of the line so
18 that they could be processed over the weekend so that they
19 could go out to the people that are going to be taking the
20 depositions.

21 And, so, Bryan and I agreed that Rich would call
22 Crivella and kind of discuss where in the pipeline that
23 material was and how to, how to elevate it.

24 So, Bryan and I didn't participate in those calls. It
25 was one call later that afternoon. It may have been more,

1 but I know there was at least one.

2 And somewhere -- I can't remember if it was Monday, but
3 there was a request by Renee and Bryan for Bates numbers.
4 And it may have actually been even on Friday a request for
5 Bates numbers. And what we --

6 MR. AYLSTOCK: It was. It was Friday afternoon.

7 MR. GAGE: It was Friday afternoon. What we did,
8 Judge, was we sent Bryan an e-mail and said, "Here's the
9 search term that, that we agreed to use in the hernia mesh
10 stip; that if you use this search term, it will kick out the
11 documents that reference, you know, Drs. Klinge and
12 Klosterhalfen." That's, that's how you kind of get into the
13 weeds and find the documents that reference the two, the two
14 people.

15 So, the -- I may be skipping over a few things here,
16 but bottom line is the issue kind of crystallized yesterday.
17 The plaintiffs said, "We need Bates numbers for the seven
18 explant reports," which Your Honor may remember we've
19 discussed on a number of calls, "plus we need Bates numbers
20 for, for anything else related to K & K."

21 And we discussed it internally and thought to
22 ourselves, well, you've got the search term. The search
23 term gives you the Bates numbers. And the search term is,
24 is a whole lot easier to navigate than given a list of Bates
25 numbers because if you give a list of Bates numbers, you

1 have to go into the system and open up one document at a
2 time typing in that Bates number, whereas if you give them a
3 search term, you get the computer to do it and you can do it
4 in, you know, whatever it is, a short amount of time, much
5 shorter than going in and individually opening up documents
6 from Bates numbers. So, we couldn't really understand what
7 was going on.

8 Furthermore, Judge, let's think about the documents
9 that we're talking about. The vast majority of the
10 documents regarding Drs. Klinge and Klosterhalfen have been
11 in plaintiffs' hands for more than 30 days. And many of
12 them have been in plaintiffs' hands for months.

13 The only ones that are new are the ones that have come
14 through the pipeline very recently. And we, Ethicon, are --
15 I mean, the outside counsel, we're getting the documents
16 at -- these newly produced ones, we're getting them at the
17 same time that the plaintiffs are getting them, meaning it's
18 -- in other words, if they wanted us to review the documents
19 to, for example, go find an even narrower pool like the,
20 just the ones that relate to consultancy, we wouldn't be
21 able to identify them because it would take -- I mean, we'd
22 have to go through all the documents one by one to try to
23 make a value judgment as to whether it relates to the
24 consultancy or not. So, -- and that would take a while. I
25 mean, it would take us a while, just as it would take the

1 plaintiffs a while.

2 So, you know, so, what we did, we talked about it late
3 last night, or e-mailed about it. And then this morning we
4 talked about it and we provided the list of Bates numbers
5 that they've requested, but it's not the ones limited to
6 consultancy. It's just the list of the documents that hit
7 on the terms K & K, Klinge and Klosterhalfen.

8 But, Judge, I don't really know how -- what else I can
9 do or what else we can do to close the gap. The search term
10 is the most, is the quickest way to do that.

11 We gave that to them on Friday. We gave them the Bates
12 numbers today. But, frankly, I think the Bates numbers are
13 a much less efficient way to get the data.

14 And then when it comes to honing in on the ones that
15 relate specifically to the consultancy, I think we're on
16 equal footing with the plaintiffs. I don't think we have
17 any superior knowledge or ability to identify those other
18 than individually reviewing all of them one by one which,
19 you know, I, it's just going to be difficult.

20 MR. AYLSTOCK: Well, Judge, this is Bryan, if I
21 could just pipe up on a couple things.

22 One is, well, they've obviously reviewed them already
23 because they have confidentiality stamps. They've been
24 reviewed for privilege. And, so, I'm not sure what all
25 that's about.

1 But what they've given us is a giant haystack with over
2 a million pages of documents that have either the word
3 "Klinge" or "Klosterhalfen" in them.

4 And as Ms. Baggett said, Klinge and Klosterhalfen are,
5 are, by Ethicon's own admission, the foremost mesh experts
6 in the world. They have been in Ethicon's consultancy since
7 the early 2000s or the late 1990s.

8 So, it's not surprising that there's a lot of documents
9 that simply have an article referenced about Dr. Klinge and
10 Dr. Klosterhalfen because they've published literally
11 hundreds and hundreds and hundreds of articles on mesh and
12 what happens with mesh and so forth.

13 What I thought that you had told us to do, both sides,
14 is, look, find the documents related to their consultancy.
15 Find the e-mails. Find the agreements. Find the documents
16 where Dr. Klinge or Dr. Klosterhalfen told you something and
17 you interacted with Ethicon.

18 And that's exactly what we did. And we produced a few
19 boxes of information where they can go through and they can
20 simply look through the documents. Here they are. Here's
21 the e-mails, you know. And they can question Dr. Klinge and
22 Klosterhalfen on everything, you know, obviously that we've
23 provided.

24 What -- the situation that we're in is now we have to
25 sort through literally in two days billions -- over a

1 million pages of documents and about 800,000 pages of
2 documents that have been produced within the last month,
3 60,000 of which have been produced within the last couple of
4 days, few days and aren't even uploaded.

5 So, this is what I had feared, as you may recall on a
6 couple of conferences ago, when you inquired about Mr. Gage,
7 "Well, Mr. Gage, can you get all of these documents to Mr.
8 Aylstock by the 31st?" And he said, "Yes." And then it
9 ended up being "no."

10 And, in fact, we got an e-mail from Mr. Gage today
11 saying, "There's more coming." And we're now, because
12 Germany is six or eight hours ahead or whatever it is, less
13 than 36 hours away from a deposition where it's literally
14 impossible for us to properly prepare for that deposition.

15 And I harken back to the call on Friday where you
16 rightly said, "Mr. Aylstock, let's make these depositions
17 fruitful. Let's streamline things. Let's have Mr. Garrard
18 fill in some gaps." And that's exactly what he tried to do
19 today. I think Your Honor got a copy of that letter a
20 little while ago.

21 So, we're in an impossible situation where we're unable
22 to prepare for these depositions or prepare these witnesses.
23 And what we don't want to have happen, what I told Mr. Gage
24 on Friday afternoon following our call -- he did call and I
25 said, "Look, I don't want to be in a position where you put

1 a haystack out there. You throw some needles in there. You
2 tell us to go fish. And we're -- one, it's not efficient
3 for the deposition. Two, it's simply not fair. These
4 documents have been requested for literally over a year, and
5 it's not fair for you to dump documents on us right
6 before -- hold them back or put them in a haystack so we
7 can't prepare and do our jobs as attorneys."

8 And it's part of a pattern where, you know, -- the
9 initial Parisi, for example, we just got documents after his
10 deposition, after the one that you ordered. Now we get more
11 documents stating that's 2002.

12 So, it's a problem, and I have an idea for streamlining
13 the depositions if Your Honor would entertain it. And that
14 would be if the defendant is -- if Mr. Thomas or some other
15 defense lawyer is going to use a document, please just tell
16 us what document you're going to use so the witness can have
17 read it and we don't waste time with the witness having to
18 read through every single page.

19 Give us some notice about it because that's the
20 position we're in because we -- simply, there is not enough
21 time between now and Dr. Klinge or Dr. Klosterhalfen to sort
22 through search terms that literally are, "Well, search the
23 data base for Klinge or Klosterhalfen."

24 That's not what we were after. That's not what these
25 many hearings have been about. They've been about the

1 consultancy between Ethicon and these witnesses. And now
2 they've given us a haystack and told us to go fish. And I
3 just don't think that's fair.

4 MR. BERNARDO: Your Honor, if I may, this is Rich
5 Bernardo. Since I feel particularly close to the production
6 and the significant efforts that my team has gone through to
7 turn things around in an extraordinarily quick time, I just
8 want to add a little bit of context and clarity.

9 First of all, the numbers that Ms. Baggett and Mr.
10 Aylstock are citing to you are grossly, grossly overstated.
11 I'm looking at a spreadsheet that we sent to them today that
12 in the entirety of this litigation going back all the way to
13 the beginning of time, we haven't even produced 100,000
14 documents or a million pages pertaining to Klinge and
15 Klosterhalfen.

16 In fact, over the entire course of the litigation,
17 they've only produced 17,000. And that's not an
18 insignificant amount of material, but it's far, far less
19 than the volume that they're saying was even produced in the
20 last month.

21 In the last installments we've been producing volumes
22 of 100 documents here, 100 documents there. And this has
23 been done because it's just taking a tremendously long
24 amount of time to get through documents that are in a
25 foreign language and to process them. And I think our

1 vendor has actually performed extremely well in an effort to
2 do it.

3 So, the numbers are not overwhelming. And most of
4 these documents have been in plaintiffs' hands for months
5 and, in some instances, years. So, I just think that's very
6 important as far as context.

7 And, secondly, to make objective calls as to what
8 pertains to a consultancy is not something that we as
9 defendants should be doing because we're going to then get
10 accused of being limiting in what we're providing to them.

11 In fact, frequently we always find in these discussions
12 that plaintiffs don't want us to be making subjective calls.
13 And we thought it was reasonable to say, "There's not that
14 much of this stuff. Here is the material that references
15 Drs. Klinge and Klosterhalfen. You're equally well suited
16 to go through them like we are and identify the ones you
17 think that are relevant."

18 Perhaps the fact that there are lots of e-mails back
19 and forth about these doctors is relevant to the plaintiffs
20 and to their consultancy. And you could be sure if we
21 didn't identify those documents, we'd all be here under a
22 different reason that there are other documents.

23 So, I just want to emphasize that the volume we're
24 talking about in terms of e-discovery is not significant.
25 And the material that has been produced at the end of the

1 process took a lot of effort to get out as quickly as they
2 did.

3 Your Honor may recall that we sent a letter last week
4 thinking we might not even be able to finish them due to
5 best efforts, but we were able to do that. So, I think
6 there's a little bit of hyperbole and exaggeration over the
7 scope of the problem. And, frankly, I'm not sure that the
8 problem is even a problem because I think what was done is
9 what is typically and appropriately done in e-discovery on
10 issues like this.

11 MS. BAGGETT: Your Honor, if I could respond to
12 that just very briefly, the numbers that I quoted you
13 earlier are directly from our vendor who had gotten on the
14 phone with the defense's group on Friday.

15 And of those that we, we quoted to you that were
16 produced since November 1st -- we've had teams of people
17 going through them. And of the three or four hundred
18 documents that they have already gone through, every single
19 one of them, minus maybe a handful, have been references to
20 studies where they have been copied on. It has nothing to
21 do with a consulting agreement whatsoever.

22 The only, the only case specific, or specific
23 productions that we have received in that regard were seven
24 documents comprising 32 pages back in August, I believe it
25 was, that were the actual consulting agreements in the

1 contract.

2 So, they've known at least since August that we need
3 more particular, and they've been looking for and probably
4 have come across more documents that are responsive to what
5 we've requested. Yet, they continue to pile on more and
6 more, even since November 1st, that have nothing to do with
7 this consulting relationship.

8 MR. AYLSTOCK: And Mr. Gage had represented to
9 Your Honor that he had sent over a team of people to Germany
10 to go find this information. They were able to find seven
11 of the explant reports. But what else did they find?

12 Obviously, they were looking for things related to this
13 and, and, you know, we're entitled to know what this team of
14 people went over there and what they found, not, not a, a
15 statement, "Go fish," which is essentially what we've got.

16 MAGISTRATE JUDGE EIFERT: Well, let, let me just
17 step in here a second.

18 First of all, let me understand the number of documents
19 because we are talking about two very different figures.
20 17,000 versus 107,000 is a huge difference. So, where is
21 the disconnect with that?

22 MR. BERNARDO: The 17,000, Your Honor, comes from
23 a spreadsheet that we put together for them, that our vendor
24 put together for them today running a search across every
25 document that has been produced to date for documents that

1 reference either Dr. Klinge or Klosterhalfen.

2 We, we had it put together and provided a list of Bates
3 numbers. And it -- I'm looking at it as we speak. It has
4 rows like an Excel spreadsheet, and the highest one is
5 17,000 -- I'm sorry. I should have said 18,000. It's
6 17,895. I didn't see the other portion. But that's every
7 document produced to date. And you can tell from the
8 documents' Bates numbers when they were produced.

9 So, that's how we're able to determine when in the
10 process that these were produced. And many of them, the
11 Bates numbers reflect that they were produced long, long
12 ago.

13 So, I'm not sure what Crivella did but, Your Honor,
14 that's how we came upon the numbers that I was citing to
15 you.

16 MAGISTRATE JUDGE EIFERT: And you have -- you've
17 provided that spreadsheet to the plaintiffs?

18 MR. BERNARDO: Yes, we provided --

19 MS. BAGGETT: Today, Your Honor.

20 MR. AYLSTOCK: Today.

21 MAGISTRATE JUDGE EIFERT: Right. But you did --
22 you do have it at this point. Is that right?

23 MR. AYLSTOCK: Well, it's 17,000 individual
24 documents, hundreds of thousands of pages, no doubt. So, I
25 don't know where exactly the disconnect is. I'm not a

1 technical guy. Renee is not a technical gal. But I know
2 what we were told.

3 But even if we take the 17,000 documents, hundreds of
4 thousands of pages today, you know, what do we do with that?
5 It's an impossible task to even do that. But that's not
6 what we've been told by our vendor about what the numbers
7 are.

8 And as to this proposition a lot of them were produced,
9 well, yeah. They were studies. What we're looking for is
10 not references to studies. We know Dr. Klinge and
11 Dr. Klosterhalfen consulted for them which is why we've been
12 on this hunt for the consultancy documents for months and
13 months and taken up way too much of the Court's valuable
14 time on it.

15 MAGISTRATE JUDGE EIFERT: Well, I understand that
16 you have the consulting agreements. Is that right?

17 MR. AYLSTOCK: We have some. I believe, I believe
18 it's complete. But based upon history, you know, I'd like a
19 certification that that's all it is.

20 MAGISTRATE JUDGE EIFERT: So -- well, you have
21 some -- you have what they've represented to be the
22 consulting agreements. What other documents do you mean
23 when you say consultancy documents? I think that's another
24 issue.

25 I hear Mr. Bernardo saying, "We don't really want to be

1 put in a position of having to sort through and define that
2 term for them because the first time we do that, they're
3 going to say that we underproduced. So, we're giving them
4 everything with Klinge or Klosterhalfen's name on it and
5 they can then choose what they think is important out of
6 that pile of documents."

7 MR. AYLSTOCK: Well, what we specifically asked
8 for a long time ago, Mr. Anderson, before Dr. Klinge even
9 testified in the Linda Gross trial in January of 2013 had
10 asked for, "Give us all the e-mails back and forth with you
11 and your folks and Dr. Klinge or Klosterhalfen. Give us all
12 the notes of the meetings with your folks and Drs. Klinge or
13 Klosterhalfen. Give us all the minutes of those meetings."

14 Those are the types of things that are important
15 because they go directly to the notice that we say these
16 witnesses gave to them. And what we don't want to have
17 happen is at the deposition things pulled out that we
18 haven't had a fair opportunity to review that we've been
19 asking for for over a year.

20 So, those are the types of things. I'm not
21 interested -- if they want to cite to Klinge or
22 Klosterhalfen, which they do all the time, I understand
23 that. We, you know, we, we get it. But what we want are
24 the interactions that they had with the Ethicon people, and
25 then the Ethicon people's notes and meeting minutes and

1 internal e-mails about what they did with that
2 information --

3 MAGISTRATE JUDGE EIFERT: Well, I don't know.

4 MR. AYLSTOCK: -- or didn't do with that
5 information.

6 MAGISTRATE JUDGE EIFERT: Yeah, that's a, that's a
7 little bit -- I haven't really understood that that's what
8 you're looking for as far as the Klinge and Klosterhalfen
9 documents. I mean, I don't know about what people may have
10 done with their information. That doesn't seem to me to be
11 directly on point as to e-mails they may have been
12 participating in and that sort of thing. So, --

13 Is somebody at the airport?

14 MR. AYLSTOCK: Sorry. I'm outside the hospital
15 and it's the Life Flight coming back. I'm sorry.

16 MAGISTRATE JUDGE EIFERT: Well, you know,
17 obviously, you have a lot of documents to go through and
18 you're concerned about that.

19 What I hear you saying is that in punishment of the
20 type of production Ethicon did, you want me to order them to
21 point to you every document they intend to use at Dr.
22 Klosterhalfen and Klinge's deposition. Is that right?

23 MR. AYLSTOCK: Well, I wouldn't use the term
24 "punishment." I would say, like you did, Your Honor, with
25 the Dr. Klosterhalfen issue last Friday, let's streamline

1 this. Let's get to the heart of the matter. Even though
2 you found that the Rule 26(a)(c) report, or whatever it is,
3 was sufficient, let's make this efficient. Let's make this
4 efficient. Let's do it in a way where both sides can know
5 what's coming, and, and order that they give us a heads up
6 about the documents they intend to use so we can focus on
7 those instead of 17,000 documents that there's simply no way
8 we can get through.

9 MAGISTRATE JUDGE EIFERT: Well, I am all for
10 streamlining these depositions.

11 Let me ask the Ethicon attorneys, do they have a
12 problem with sharing the documents they intend to use during
13 these depositions?

14 MR. GAGE: Judge, it would seem to me that if it's
15 a two-way street, it's not that big of a deal. I mean, I --
16 you know, Bryan had not put that offer on the table before
17 this call. And, so, you know, -- but, you know, as I sit
18 here, if it goes both ways, you know, --

19 MAGISTRATE JUDGE EIFERT: That seems, that seems
20 very reasonable.

21 MR. GAGE: I mean, I suppose we could do it.

22 MAGISTRATE JUDGE EIFERT: What about that, Mr.
23 Aylstock? You both -- you give them the documents you
24 intend to use during the depositions and they'll give you
25 the documents that they intend to use.

1 Now, that doesn't mean that if you get there and
2 there's some other document that you want to use that you
3 can't use it. But the idea is to exchange sitting here
4 today or tomorrow what you know you're going to be asking
5 the witness about, exchanging those documents.

6 MR. AYLSTOCK: For these witnesses, Your Honor, I
7 think we would certainly agree to that because -- well, one,
8 we've given them three boxes or so of stuff. It's pretty
9 easy to get through.

10 So, I think ours are going to most likely come from
11 that because we haven't had an opportunity to get through
12 most of the other stuff. But on these witnesses, I think
13 that's a good solution.

14 MAGISTRATE JUDGE EIFERT: All right.

15 MR. GAGE: And, Judge, -- this is William. Well,
16 I guess it doesn't really matter. I was just going to say
17 that, that I know that we're -- I mean, we on our end are
18 reviewing the documents as well. And, and I don't know when
19 that process is going to be complete.

20 And all I was going to say is I think, I think we
21 probably need to do this in a way that lets both sides
22 continue their respective review of the documents up until,
23 you know, pretty close in time to the depo because I know
24 Bryan is going to keep reviewing. I know we're going to
25 keep reviewing.

1 And, in other words, if we exchanged tomorrow, it may
2 be a little premature. We may want to do it the night
3 before the depo or something like that or, or, or a day
4 before the depo or something like that.

5 MAGISTRATE JUDGE EIFERT: Well, what I would
6 suggest you do is if you already know there are certain
7 documents that you're going to use, exchange those. As each
8 day passes, if there's more documents you know you're going
9 to use, exchange those up until the point of, you know, an
10 hour before the deposition if need be.

11 MR. GAGE: Okay.

12 MAGISTRATE JUDGE EIFERT: And, you know, I'm going
13 to trust that both, both sides will be open and forthcoming
14 with the documents and not try to spring something on the
15 witness or on the other side at the deposition because that
16 would be so fruitless, it wouldn't be worth it.

17 MR. AYLSTOCK: I understand, Your Honor. We're at
18 a little bit of a disadvantage because we go second. So, a
19 lot of what we ask will probably depend on what's asked
20 initially. But we'll certainly follow Your Honor's
21 directive.

22 MR. GAGE: And, Judge, --

23 MAGISTRATE JUDGE EIFERT: All right.

24 MR. GAGE: Judge, David Thomas who's going to be
25 taking these depositions is, I think, on a plane headed over

1 there right now.

2 MAGISTRATE JUDGE EIFERT: Right.

3 MR. GAGE: I think he, I think he just got on the
4 plane or he's getting close to getting on the plane. So,
5 he's going to be out-of-pocket for -- I don't know how long
6 that flight is. I think it's going from Detroit. My guess
7 is it's probably, what, about an eight-hour flight to
8 Germany?

9 MAGISTRATE JUDGE EIFERT: I would say.

10 MR. GAGE: Yeah. And, so, --

11 MAGISTRATE JUDGE EIFERT: Seven maybe.

12 MR. GAGE: Yeah. And I can send him an e-mail
13 which I assume he can get. But, you know, it may be
14 tomorrow before he can make a -- he's the only guy making a
15 decision as to what's going to be used during the depo.

16 MAGISTRATE JUDGE EIFERT: Right.

17 MR. GAGE: You know, we've got people reviewing --

18 MAGISTRATE JUDGE EIFERT: That -- it's 4:30 now.

19 I don't think it's going to matter much if it's tomorrow
20 before he can get the documents. I can't imagine --

21 MR. GAGE: Okay.

22 MAGISTRATE JUDGE EIFERT: I can't imagine that any
23 of you are going to use hundreds of pages of documents
24 because there's no way you'll ever get the deposition done
25 if you do that.

1 MR. GAGE: And, Judge, I guess to clarify one
2 other thing just so that we don't have any
3 misunderstandings, you know, the way that I think it's going
4 to work is we've got a fact deposition for one, for one day
5 of seven hours followed by an expert deposition. And I'm
6 assuming that -- I'm just trying to get in my mind, does the
7 Court's ruling apply to just the fact witness depo or to
8 both or is there any real reason for us to distinguish
9 between the two?

10 MAGISTRATE JUDGE EIFERT: I see no reason to
11 distinguish between the two. I mean, either way what you're
12 talking about doing is sharing work product. So, if you're
13 going to share it for the fact witness portion, why not
14 share it for the expert witness portion?

15 MR. GAGE: I suppose I would say this, Your Honor.
16 If, for example, on the expert deposition we were going to,
17 for example, ask the witness about a document that appeared
18 on his reliance list -- in other words, it's a document that
19 maybe is even cited in the plaintiffs' expert report. I
20 don't believe Your Honor -- I don't believe it's the intent
21 of Your Honor's ruling to require us to disclose those.

22 I think the intent is to require us to disclose
23 documents that emanate from the Ethicon production that the
24 plaintiffs themselves -- I --

25 MAGISTRATE JUDGE EIFERT: Yes.

1 MR. GAGE: Am I making sense, Judge?

2 MAGISTRATE JUDGE EIFERT: Absolutely. What I,
3 what I would expect you to do are from the documents that
4 Ethicon produced to identify those which you intend to use
5 because the problem that I understand the plaintiffs are
6 having is that they're having trouble going through your
7 production.

8 And, on the flip side, the documents that the
9 plaintiffs produce to Ethicon, out of those documents they
10 should pull out the ones they think they'll be asking Drs.
11 Klinge and Klosterhalfen about. But not -- you know, if, if
12 you know that the plaintiff has a document, you don't have
13 to tell the plaintiff you're going to use a document that's
14 the plaintiffs' document. I mean, they should already be
15 familiar with their own documents. This is just a way to
16 streamline the productions.

17 MS. BAGGETT: And, Your Honor, in addition to
18 that -- this is Renee Baggett, Your Honor. One thing, one,
19 one thing that concerns me is, like we've experienced in the
20 past, is the last-minute document dump.

21 I think it might be prudent to also limit the defense
22 from being able to use a document if it's not identified in
23 enough time for the, the, our fellows that are taking the
24 deposition to have a chance to review it and, and, and plan
25 on preparing the witness or doing what they need to do to

1 prepare to defend that document.

2 MAGISTRATE JUDGE EIFERT: I'm not, I'm not -- no,
3 I'm not going to go that far. I think that the documents on
4 both sides have been produced pretty late in the game for
5 these witnesses. You've known about these witnesses for
6 months. We've talked about them for months. I, I'm not
7 going to go that far. I, I'm going to rely on both sides
8 to, in good faith, turn over everything they anticipate
9 they're going to use.

10 But if something should come up at the deposition that
11 requires them to use another document or a different
12 document, I'm not going to preclude the use of that
13 document. I mean, those things happen. What I'm trying to
14 do is --

15 MR. AYLSTOCK: But I would, I would just expect
16 that they would at least be on that list of 18,000 documents
17 that have been specifically identified so that we're not --
18 we can at least go through them. I think that's what Ms.
19 Baggett was getting at.

20 MAGISTRATE JUDGE EIFERT: Well, if it's a document
21 you've given to them, I'm not going to make them tell you
22 they're going to use that document, just like I don't, I'm
23 not going to tell you that you have to tell them which of
24 their documents you're going to use. I'm saying --

25 MR. AYLSTOCK: Understood, Your Honor.

1 MAGISTRATE JUDGE EIFERT: Yeah. So, --

2 MS. BAGGETT: And that's not really what I was
3 intending, Your Honor. I apologize if I was confusing. I
4 meant of the documents that the defendants have in their
5 possession that plaintiffs would not be expected to have if
6 we have not been provided, you know -- at least that
7 document has not been identified, that we have that, you
8 know, the benefit of them not being able to use the document
9 that neither our, our counsel or the witness has ever seen
10 before.

11 MAGISTRATE JUDGE EIFERT: Well, I'm not prepared
12 to make that ruling. I think if that should occur at the
13 deposition and you believe that it was prejudicial to you,
14 then you need to make a motion at that point to strike the
15 document, strike the testimony pertaining to the document.
16 And then that issue can be addressed at that time.

17 But a deposition is not always that well planned. And
18 things do come up in depositions that might require you to
19 use documents you weren't intending to use or ask questions
20 you didn't intend to ask. And I'm not going to make those
21 hard and fast limitations at this point.

22 MS. BAGGETT: Thank you, Your Honor.

23 MAGISTRATE JUDGE EIFERT: But I've told you what I
24 expect. I know you're all very honorable lawyers. I'm sure
25 you will exercise the best of intentions in exchanging these

1 documents. And I think that's a very good solution if
2 you're both willing to do it.

3 MR. AYLSTOCK: Yes, Your Honor. Thank you very
4 much.

5 MAGISTRATE JUDGE EIFERT: Thank you.

6 MR. GAGE: Thank you, Judge.

7 MAGISTRATE JUDGE EIFERT: All right. Good luck on
8 your depositions then.

9 MR. GAGE: Thank you. Judge, I think we're on for
10 Friday at, at the regular time.

11 But, Bryan, I mean, I don't know if, if you've got
12 anything that we need to -- I mean, if there are -- do we,
13 do we have an agenda for Friday that we need to bother the
14 Judge with or are we clear for Friday?

15 MR. AYLSTOCK: Well, I think the main thing -- and
16 I have been out-of-pocket, so I'm shooting from the hip
17 here. But the main thing related to the late production of
18 the Dr. Cecchini and Parisi documents and, you know, our
19 request for more time given that late production.

20 But maybe we can split the baby on that, William. And,
21 so, I'm happy to talk further about that. I'm not prepared
22 to say whether there's anything else or not. So, if you're
23 suggesting there's something to talk about there, maybe we
24 can put off Friday. I don't know.

25 MR. GAGE: Yeah. Your Honor, I mean, if Your

1 Honor is okay with this, I mean, I don't want to, I don't
2 want to impose upon the Court, but my sense of it is we do
3 have one deposition issue that Bryan and I need to talk
4 about. But it, it's -- he and I really kind of need to meet
5 and confer before I think we bring it to Your Honor's
6 attention because I have a position, but I'm certainly
7 willing to change my position once Bryan and I can talk
8 through the facts.

9 My thought would be if Your Honor is okay with us maybe
10 approaching you on an as-needed basis as opposed to having
11 the standing call on Friday, that may be a better solution
12 if Your Honor and Bryan are willing to do that.

13 MAGISTRATE JUDGE EIFERT: It makes no difference
14 to me. I'm really just -- I just want to be available to
15 help you move your discovery along. So, I don't have a
16 preference one way or the other. The only, the only caveat
17 is that I may not always be available.

18 MR. AYLSTOCK: If Your Honor would indulge me to
19 confer with Renee and Tom on that because I am certainly out
20 of the loop on a lot of things at present before, --

21 MAGISTRATE JUDGE EIFERT: Sure.

22 MR. AYLSTOCK: -- before putting off that hearing.
23 We'll notify the Court promptly if, if we don't have
24 anything to say or fight about.

25 MAGISTRATE JUDGE EIFERT: That's fine.

1 MR. GAGE: That's fine.

2 MAGISTRATE JUDGE EIFERT: Okay, all right.

3 MR. GAGE: Thank you, Judge.

4 MAGISTRATE JUDGE EIFERT: I appreciate you guys
5 trying to work this out. I think this is a good, workable
6 solution, and hopefully it will help make the depositions go
7 a little faster and a little more smoothly. So, good luck
8 with everything.

9 MR. GAGE: Right. Thank you, Judge Honor.

10 MR. AYLSTOCK: Thank you, Your Honor.

11 MS. BAGGETT: Thank you.

12 MAGISTRATE JUDGE EIFERT: Bye.

13 (Proceedings concluded)

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17 I, Lisa A. Cook, Official Reporter of the United
18 States District Court for the Southern District of West
19 Virginia, do hereby certify that the foregoing is a true and
20 correct transcript, to the best of my ability, from the
21 record of proceedings in the above-entitled matter.

22

23

24 s\Lisa A. Cook

November 7, 2013

25 Reporter

Date